UNITED STATES OF AMERICA
EFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY d/b/a/ THE REGISTER GUARD,	)	
RESPONDENT,	)	
AND	)	CASE NOS. 36-CA-8743-1
	)	36-CA-8849-1
THE EUGENE NEWSPAPER GUILD LOCAL 194,	)	36-CA-8789-1
	)	36-CA-8842-1
CHARGING PARTY.	)	

RESPONDENT'S ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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COMES NOW Respondent, The Guard Publishing Company d/b/a *The Register-Guard* (hereinafter "*The Register-Guard*" or "Company"), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, ("Board"), and files its Answering Brief to the General Counsel's Exceptions to the February 21, 2002 Decision of Administrative Law Judge John J. McCarrick ("ALJ"), and in support hereof offers the following:

I. E-MAIL, ESPECIALLY THE SPAM DISSEMINATED IN THIS CASE, IS DISTRIBUTION, NOT SOLICITATION.[1]

Contrary to the General Counsel's assertion, e-mail, especially the e-mail at issue in this case, was not "solicitation." Additionally, contrary to the General Counsel's assertion, ALJ McCarrick did not rule that e-mail messages are solicitation, but rather, merely recited the General Counsel's characterization of the e-mail messages at issue in rejecting the General

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[1] Respondent first and foremost believes this case should be analyzed using a Lechmere analysis of private property rights. If, however, e-mail is to be characterized a solicitation or distribution, e-mail is more akin to distribution.

Counsel's assertion that the Company's 1996 Communications System Policy was an overbroad no solicitation no distribution policy. (ALJ Dec., p. 7, L. 24-32).[2] The Board has distinguished distributions from solicitations on the basis of the following four factors:

- A distribution is a written communication, whereas a solicitation is generally an oral communication;
- A distribution is a uniform message sent to a large number of people at one time. A solicitation is a one-on-one communication seeking an immediate response from the listener.
- A distribution is complete once it is received; it is designed to be permanent in nature, retained by the recipient for reading and re-reading at his convenience, viewed, and responded to, if at all, at the recipient's leisure. A solicitation, in contrast, requires an immediate response to be effective; and
- A distribution has the potential to litter the employer's property.

Stoddard-Quirk Manufacturing., 138 N.L.R.B. 615, 619-20 (1962).

a. The goal of the e-mail in this case was achieved upon receiving it, and the recipient could respond at any time and re-read the e-mail at his convenience.

The test of whether an e-mail is a distribution or solicitation is not, as the General Counsel asserts, whether a communication "could reasonably be expected to occasion a spontaneous response or initiate a reciprocal conversation." Any communication could be so characterized, regardless of whether the communication includes a question or statement. Further, the General Counsel's proposed test for defining distributions and solicitations is not found anywhere in Board law. Rather, the long-applied test enunciated by the Board four

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[2] Although Respondent disagrees with the General Counsel's characterization of the ALJ's decision, if such a recitation by the ALJ can be properly construed as finding e-mail to be solicitation, rather than distribution, then the Board has already ruled that e-mail is distribution, and the Board must reverse ALJ McCarrick's holding, as the ALJ's finding is contrary to Board law. E.I. DuPont De Nemours & Company, 311 N.L.R.B. No.88, Slip. Op., at 1, n.4 (1993) (finding merit in the Respondent's exception to the ALJ's remedy to "discriminatory prohibition of the use of the electronic mail system for **distributing** union literature and notices" **emphasis** added); Lockheed Martin Skunk Works, 2000 WL 1054861, *4-5, 164 L.R.R.M. 1329 (2000) (finding that the union mounted a vigorous campaign, which included the "**widespread distribution**" of its election materials via the employer's interoffice-mail, direct solicitation and the employer's e-mail system. **Emphasis** added).

decades ago is whether the "message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. Hence, the purpose is satisfied so long as it is received." Stoddard-Quirk, at 620. Here, the General Counsel's own witness, former Union Treasurer Lance Robertson, testified as follows regarding receiving e-mail at his Company-provided e-mail account:

> "[T]he person, then can—you know, open it at their own leisure and read it – whenever they want and respond whenever they want."

(Tr. p. 167, L. 7-9). Further, when asked to compare using a telephone to orally communicate a message to a co-worker and using e-mail to do the same thing, Robertson stated:

> with e-mail you don't feel obligated to answer. I mean, when you – your phone rings, you feel obligated to answer it. With an email you could choose to either open the email message or not open the email message. I think the recipient of an email message has a lot more options for when they choose to open and respond and deal with an email message."

(Tr. p. 168, L. 13-19). Obviously, e-mail, unlike an oral communication, is designed to be permanent and read and re-read at the recipient's leisure. Further, the e-mail message at issue in this case did not ask the recipients to respond to the sender or provide some sort of immediate feedback. (G.C. Ex. 5). In contrast, the e-mail message simply encouraged the recipients to take group action at a future date to support the union. When the recipients received Ms. Prozanski's spam, the communication's purpose was complete. E-mail, especially the e-mail at issue here, was a distribution. Thus, unlike the circulation of an election petition or union authorization cards, which are distributed with the design that the recipients sign their respective names to them and immediately return them to the person who distributed them, spam, especially the spam at issue in this case, is designed for the recipient's retention and attention when and as often as the recipient desires to read it.

With respect to whether the e-mail at issue was distributed on a one-on-one basis, the undisputed testimony in the record is that the e-mail distribution for which an employee was disciplined was a mass e-mail ("spam") sent to at least 100 people at one time. (Tr. p. 131, L. 3-8).

b. E-mail has the real potential to cripple an employer's business.

Last, like paper form distributions, spam also has the potential to litter the employer's property and interfere with its business operations. Not only can spam clog and overrun a provider's system, or at least retard its efficiency by using up available system space with the spam messages, senders can infect the provider's electronic communications system with viruses that can paralyze said systems for hours, days, and even weeks. The relevant issue in determining whether a communication is a distribution has never been whether the particular communication actually interfered with an employer's business or actually littered the employer's property, but rather whether the communication had the real potential to do so. Stoddard-Quirk, at 619-20 & n.7 (holding that "distribution of literature, because it carries the **potential** of littering the employer's premises, raises a hazard to production" and that a no-littering rule is not a viable alternative to allowing employers to prevent potential littering, because it is impossible to define when a sufficient number of copies of a distribution on the ground constitute "littering." **Emphasis** added).

Thus, all the criteria for distinguishing distributions from solicitations show that the spam sent by Ms. Prozanski was clearly a distribution, not a solicitation.

II. UNLIKE REPUBLICAN AVIATION, RESPONDENT'S COMMUNICATION SYSTEM POLICY DOES NOT PROHIBIT ALL DISTRIBUTION AND SOLICITATION ON THE COMPANY'S PROPERTY.

Citing The Rose Company, 154 N.L.R.B. 228 (1965), and Southwire Company, 145 N.L.RB. 1329 (1964), the General Counsel continues to rely on case law dealing with total bans on distribution and solicitation in order to support its argument that a time/place restriction on distribution violates the Act. The General Counsel's reliance thereon is misplaced, as the Company's 1996 Communications System Policy does not effect a total ban on distribution on the Company's property. In fact, the parties' collective bargaining agreement provides the Union with bulletin board space, (Tr. p. 204, 15-25; Resp. Ex. 5); the e-mail spam distributed by Suzi Prozanski at issue in this case in hard copy form was posted on the bulletin board in the Company's facility provided for union communications. (Tr. p. 329, L. 8-16). The Union and unit members had the ability to communicate with one another about the Union in a host of ways, including:

- The Union's monthly printed publication, "The Guardian";
- The written bargaining bulletins paid for and distributed by the Union;
- Through the United States Mail, using the name and address list provided by the Company to the Union;
- The Bulletin Boards in all of the departments where the Union represents employees, as well as in the cafeteria;
- Personal conversation on non-working time;
- Wearing armbands while not working with the public; and
- Distributing flyers at the employee entrance, as the Union has done for years.

(Tr. pp. 76, 117-19, 121, 124-25, 204, 239-40, 258, 384).

III. COMPUTERS, LIKE COMPANY-PROVIDED PENS AND PAPER, DESKS AND CHAIRS, PAINT BRUSHES, HAMMERS AND NAILS, AND PRINTING PRESSES AND PAPER FOLDERS, ARE EQUIPMENT USED IN WORK AREAS; THEY ARE NOT THEMSELVES WORK AREAS.

The General Counsel argues that Company-provided computers and e-mail accounts are "work areas" in order to convince the Board to analyze the use of Company-provided computers and e-mail accounts in this case under standard no-solicitation no distribution policy jurisprudence, rather than according to jurisprudence analyzing employees' rights to use employer-owned equipment for the purpose of distribution and/or solicitation. Although Defendant believes that the General Counsel's point is irrelevant to the ultimate outcome of this case, the General Counsel's argument is incorrect. Computers and e-mail accounts are tools used in work areas; they are not themselves work areas.[3] Although the Record reflects that computers are merely preferred tools, not necessary tools, in the Company's Circulation Department,[4] (Tr. p. 383, L. 2-25; Tr. p. 384, L. 12-25; Tr. p. 385, L. 1-8; Tr. p. 274, L. 14-25; Tr. p. 275, L. 1-7), just as the paint brush is an essential **tool** to the unionized painter, and the hammer an essential **tool** to the unionized carpenter, a computer is, at most, a useful **tool** to some of the Company's employees. As General Counsel's witness, Bill Bishop stated, everything he does via e-mail he did before by simply getting up from his chair, walking over to a co-worker and saying what he needed to say. (Tr. p. 274-275). According to Bishop, e-mail just made things easier; he never testified e-mail was necessary to do his job or to discuss union activity with others. Id. The Company's Executive Editor testified without rebut that it takes only thirty (30) seconds to walk from one side of the newsroom to the other, that every employee has a telephone at their work

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[3] If computers/e-mail are work areas, a rule prohibiting distribution in work areas is presumptively valid. Since e-mail is more akin to distribution than solicitation, a ban on using e-mail is presumptively valid.

[4] Respondent maintains that, in accordance with its objection to the Finding of the ALJ, No. 54, there is no evidence that al l employees used or had access to computers.

station, and that employees are free to walk around the facility and talk to others when they take their self-scheduled breaks. (Tr. p. 383-385).

Computers are not work areas, they are tools of convenience owned by the Company. Accordingly, as then member Hurtgen found, the Board must analyze the Company's policy regarding the use thereof by applying Board law and case law regarding the use of the employer's equipment. Mid-Mountain Foods, Inc., 332 N.L.R.B. No. 19, slip op. at 2 (2000), 2000 N.L.R.B. LEXIS 638, *10, n.7 (Member Hurtgen finding a key distinction between the use of a room and the use of a television set in the same room).

The General Counsel's argument that Company-provided computers are work areas is contrary to established Board law and makes absolutely no sense.

CONCLUSION

For all the foregoing reasons, *The Register-Guard* respectfully requests that the Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety, that the Exceptions of *The Register-Guard* be granted, that the Exception of the General Counsel be denied, and that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto.

Respectfully submitted,

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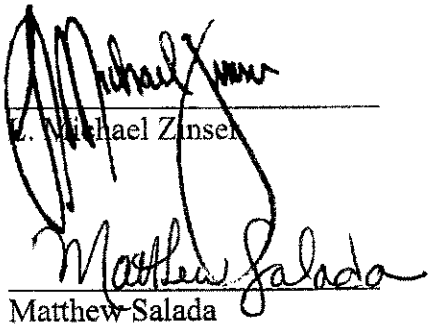

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CERTIFICATE OF SERVICE

I hereby certify that this 13th day of May, 2002, that I caused to be served a copy of Respondent's Answering Brief to the General Counsel's Exceptions to the Decision of the ALJ via Federal Express to the following:

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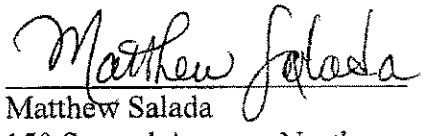
Respectfully,



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